Supreme Court, U.S.
FILED
APR 6 1995
OFFICE OF THE CLERK

No. 94-1226

In The Supreme Court of the United States

October Term, 1994

Fleming Foods of Alabama, Inc.,
Petitioner,

v.

Department of Revenue
State of Alabama,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

---

SUPPLEMENTAL MEMORANDUM OF AUTHORITY

David R. Almond
Fleming Companies, Inc.
6301 Waterford Blvd.
Oklahoma City, OK 73126
(405) 840-7290

Richard C. Hutchison
Hutchison, Neider, Ward & King
5242 South College Drive
Suite 330
Salt Lake City, UT 84123
(801) 268-9868

Rex E. Lee *
Carter G. Phillips
Nathan C. Sheers
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

April 6, 1995

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES

	Page
American Trucking Ass'ns v. *Scheiner*, 483 U.S. 266 (1987)	3
Central Greyhound Lines, Inc. v. *Mealey*, 334 U.S. 653 (1948)	3
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)	1
Oklahoma Tax Comm'n v. *Jefferson Lines, Inc.*, No. 93-1677 (U.S. Apr. 3, 1995)	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1226

FLEMING FOODS OF ALABAMA, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE
STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

---

SUPPLEMENTAL MEMORANDUM OF AUTHORITY

Petitioner submits this supplemental brief pursuant to Rule 15.7 of the Rules of this Court in light of this Court's decision in *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, No. 93-1677 (U.S. Apr. 3, 1995). The Court issued its opinion in *Jefferson Lines* after all briefing with respect to this petition for certiorari had been completed.

In *Jefferson Lines*, this Court held that an unapportioned state sales tax on services purchased in one state but completed in more than one state did not violate the Commerce Clause. Under the test in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), taxes generally must be apportioned in some way to ensure that " 'each State taxes only its fair share of an interstate transaction.' " *Jefferson Lines*, slip. op. at 9 (quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 261 (1989)).

The Court in *Jefferson Lines,* however, meticulously distinguished its particular treatment of sales taxes on both goods and services from the more general rule applicable to gross receipts and income taxes. *Id.* at 11. The Court characterized a sale as a " 'peculiarly local,' " *id.* at 6, "unique" event, *id.* at 13, that can be "consummated" only in one State, *id.* at 11. Thus, sales taxes, by their very nature, "[can]not be repeated by other States." *Id.* at 12. Accordingly, under the Commerce Clause it is not necessary for States to apportion sales taxes, whether for goods or services, among other States. *Id.* at 21-22.

Justices Breyer and O'Connor dissented, arguing that the distinction carefully articulated by the Court between sales and gross receipts taxes simply had less force than the practical similarities between the two kinds of taxes. *Id.*, Dissent slip. op. at 4. Justices Scalia and Thomas concurred in the result reached by the majority, but contended that the Court should not enforce the Commerce Clause unless the tax facially discriminates against interstate commerce.

The fundamental question presented in the petition—whether Alabama's unapportioned use tax discriminates against interstate commerce—was not resolved by the Court in *Jefferson Lines.* The Court merely mentioned use tax schemes in passing, *id.*, slip op. at 20, and made explicit the difference between the subjects of sales and use taxes: "However complementary the goals of sales and use taxes may be, the taxable event for one is the sale of the service, not the buyer's enjoyment or the privilege of using [the State's] roads." *Id.* at 24.

It is manifestly evident that the reasons justifying the Court's review of *Jefferson Lines* thus apply with equal force to this case. The constitutionality of unapportioned use taxes is of no less moment than that of sales taxes. As this Court noted, 45 States and the District of Columbia currently impose use taxes. *Id.* at 19. This petition

presents the Court with a vehicle by which it can complete the careful restatement and development of interstate taxation jurisprudence embodied in *Jefferson Lines* by determining which rule of law applies to use taxes—the apportionment among states required for gross receipt and income taxes under *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1948), or the "different course" applicable to sales taxes under *Jefferson Lines.*

Alabama's use tax, unlike Oklahoma's sales tax, does not tax a unique or local event. Instead, Alabama taxes *in full* the actual *use* of petitioner's trucks and trailers. The State concedes that it seeks to tax the use of vehicles travelling over the roads of twelve States, and that these vehicles travel only 38% of their mileage in Alabama. See Pet. App. 24a-25a. Alabama clearly is not the only site of the taxable event, the use of the vehicles. Nevertheless, the State of Alabama maintains that it need not apportion its use tax under the Commerce Clause. Accordingly, the State's tax "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" and thus fails the external consistency requirement of *Complete Auto. Jefferson Lines*, slip. op at 10.

Moreover, unlike the taxpayer in *Jefferson Lines*, petitioner has also contested the Alabama tax under the third prong of the *Complete Auto* test which prohibits discrimination against interstate commerce. Alabama's use tax has an undeniable discriminatory effect on interstate commerce. A trucking enterprise operating its vehicles exclusively within the State of Alabama bears a proportionately lower use tax burden than an enterprise with an identically priced fleet used only in part within the State. Alabama's tax, unlike the sales tax in *Jefferson Lines*, is assessed on the *use* of petitioner's vehicles and is not distinguishable from the flat user fee tax prohibited in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987). Alabama's insistence on taxing in full trucks

and trailers used only in part within the State clearly violates the Commerce Clause.

This case squarely presents the Court with a question of great importance that remains unresolved and is particularly ripe for resolution in light of its decision in *Jefferson Lines*. The Court should now determine the appropriate test for ascertaining the constitutionality of a state's unapportioned use taxes assessed on interstate commerce.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. ALMOND
FLEMING COMPANIES, INC.
6301 Waterford Blvd.
Oklahoma City, OK 73126
(405) 840-7290

RICHARD C. HUTCHISON
HUTCHISON, NEIDER, WARD & KING
5242 South College Drive
Suite 330
Salt Lake City, UT 84123
(801) 268-9868

REX E. LEE *
CARTER G. PHILLIPS
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

April 6, 1995

* Counsel of Record